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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE APPLICATION OF: :  
Hideaki SAKAI, et al. : GROUP ART UNIT: 1761  
SERIAL NO.: 10/083,387 : EXAMINER: TRAN, Lien T.  
FILED: FEBRUARY 27, 2002 :  
FOR: PROCESS FOR PRODUCING :  
FRIED INSTANT NOODLES :

REPLY BRIEF

COMMISSIONER FOR PATENTS  
ALEXANDRIA, VIRGINIA 22313

SIR:

The following is a reply to the examiner's answer of September 29, 2004 to appellants' appeal of the examiner's final rejection of January 30, 2004.

The present invention is directed to a method of producing fried instant noodles, and fried instant noodles obtained by such a method.

The claims are not rendered obvious because none of the cited prior art of record suggests the unexpected result of an improved texture resulting from preparing instant fried noodles using an oil/fat composition comprising at least 60 wt. % of diglycerides.

The examiner has cited the reference of Greene et al. asserting a disclosure of a method of making instant fried noodles, but failing to describe the claimed oil/fat composition (page 4, lines 1-3 of Examiner's answer). The examiner further cites Gotoh et al. asserting a disclosure of the claimed oil/fat composition. Gotoh et al. fails to describe a method of making instant fried noodles. Thus neither of the cited

references anticipates the claimed invention as each reference is deficient in teaching a claim element of appellants' invention. Greene et al. fails to describe the claimed oil/fat and Gotoh et al. fails to describe the claimed method of preparing fried instant noodles.

Under 35 U.S.C. Section 102, every limitation of a claim must identically appear in a single prior art reference for it to anticipate the claim. *In re Bond*, 15 USPQ2d 1566, 1567 (Fed. Cir. 1990).

The examiner relies on Greene et al. for teaching a general method of preparing instant fried noodles, in the absence of a teaching of the claimed diglyceride oil composition. By failing to disclose or suggest an oil composition comprising at least 60 weight% of diglycerides, the reference cannot suggest that, in a method for the preparation of fried instant noodles, an improved texture would be obtained.

Gotoh et al. describes a liquid general-purpose edible oil containing 1,3-diglycerides, in an amount of at least 40% by weight and a most preferable amount of at least 50% by weight (column 2, lines 44-49). There is no disclosure or suggestion of the preparation of instant fried noodles. As a general-purpose oil which is described as having beneficial health effects as well as excellent storage stability and flavor (column 2, lines 37-44), there is no suggestion of an improved texture of an instant-fried noodle. Moreover, as Gotoh et al. does not prepare fried instant noodles, there can be no expectation of obtaining fried instant noodles having an improved texture. The claimed method is nowhere disclosed or suggested in Gotoh et al.

Miyazaki et al. has also been cited by the examiner as disclosing a method of making fried instant noodles in which additives such as an antioxidant and egg are added (column 5, lines 1-5). Miyazaki et al. fails to disclose or suggest a method of heating noodles in an oil/fat composition comprising at least 60 wt.% of diglycerides. Like Greene et al., by failing to disclose or suggest an oil composition comprising at

least 60 weight% of diglycerides, the reference cannot suggest that in a method for the preparation of fried instant noodles, an improved texture would be obtained.

Appellants have discovered that use of an oil composition comprising at least 60% of diglycerides in a frying step of a method of producing fried instant noodles, provides for an improvement in the texture of reconstituted fried instant noodles, a result which is not suggested in the cited references. Prior to appellants' discovery there was no disclosure of any relationship between the texture of instant fried noodles and the diglyceride content of the oil use to fry the instant fried noodles. Put in other terms, back in August of 1999, those face with the problem of improving the texture of instant fried noodles would not have been motivated to seek an oil/fat having a diglyceride content as claimed as there was no suggestion that such a variable would have a favorable effect on the texture of instant fried noodles.

The examiner has committed reversible error in concluding the claimed invention to be obvious over the cited prior art, as none of the cited prior art of record suggests the unexpected result of an improved texture resulting from preparing instant fried noodles using an oil/fat composition comprising at least 60 wt. % of diglycerides.

As **evidence** of the production of fried instant noodles having a smooth structure, appellants submitted the declaration of Jun Kohori, a researcher in the field of biotechnology and food science employed by the Kao Corporation, the assignee of the above-identified application. Appellants' direct head-to-head comparison, changing only the composition of the oil used to fry the noodles is probative of the lack of obviousness of the claimed invention.

The formulations of the oils are shown in Table 1

Table 1

Sample	preparation					a content (wt%) of		
	Rapeseed Oil <sup>1)</sup>	Hi Di-glycerides oil/fat <sup>2)</sup>	Vitamin E (%)	Ascorbic Acid ester (%)	Silicone <sup>3)</sup> (%)	Tri-glycerides	Di-Glycerides	Mono-glycerides
( 1 )	0.00	99.90	0.07	0.03	0.0002	13.5	85.7	0.7
( 2 )	24.98	74.93	0.07	0.03	0.0002	34.7	64.7	0.5
( 3 )	49.95	49.95	0.07	0.03	0.0002	55.9	43.7	0.3
( 4 )	99.90	0.00	0.07	0.03	0.0002	98.3	1.6	0.0
1 ) "Canola Oil", a product of Honen Corp.								
2) Tri-glycerides 13.5%, Di-glycerides 85.8%, Mono-glycerides 0.7% (Oil/Fat obtained by reacting fatty acid, which had been obtained by hydrolyzing refined rapeseed oil, with glycerin in a manner known per se I 'in the art while using an immobilized, 1,3-specific lipase as a catalyst and then refining the reaction product								
3)"K S - 6 6", a product of Shin-Etsu Chemical Co., Ltd.								

Oil samples (1) and (2) have a diglyceride content of at least 60 wt.%, while samples (3) and (4) have a diglyceride content below 60 wt.% and are therefore outside the scope of the claims and are therefore viewed as comparative examples.

Noodles were produced by optimizing the general method of Greene.

The results of the classification of the noodles follows in Table 2.

Table 2						
	Flavor			Texture		
	Oiliness	Flour	Kansui	Smooth-ness	Elasticity	Soggi-ness
1	A	A	A	A	A	A
2	A	B	B	B	B	A
3	A	B	B	C	C	A
4	A	C	C	D	C	A

The test results for evaluating smoothness and elasticity are provided on page 5 of the Kohori declaration and are reproduced as follows:

#### Smoothness

- A: very smooth noodle surface
- B: smooth surface noodle
- C: rather smooth surface noodle
- D: rough noodle surface without smoothness

## Elasticity

- A: very elastic
- B: rather elastic
- C: small elastic, noodle snaps
- D: no elastic

The results of Table 2 demonstrate that the noodle that has been produced using sample (1) or sample (2) in which the diglyceride content of at least 60 wt.%, as frying oils have superior smoothness and elasticity, as compared with the otherwise same method utilizing sample (3) and sample (4), having a diglyceride content below 60 wt.%, as frying oils. Thus, the noodles made from the claimed method in which the diglyceride content is at least 60 wt.% are clearly superior in elasticity and smoothness when compared to noodles made using a oil/fat composition containing less than 60 wt.% of diglyceride.

Moreover, Mr. Kohori provides his opinion on page 7 of his declaration that “[T]he comparative data provided above clearly demonstrates that the noodles and method of making the same is superior to those noodles and methods utilizing an oil with less than 50 % diglycerides and greater than 40% diglycerides as disclosed by Gotoh et al.

Although factual evidence is preferable to opinion testimony, such testimony is entitled to consideration and some weigh so long as the opinion is not on the ultimate legal conclusion at issue. (MPEP 716.01(c)(III))

In light of the above, it is clear that a noodle heated in an oil containing less than 60% and greater than 40% diglyceride as disclosed by Gotoh et al. and further prepared according to an optimized method disclosed by Greene et al. is less acceptable in regards to its smoothness and elasticity.

In contrast, the claimed noodle made by the claimed method of heating in an oil containing at least 60% is superior in regards to its smoothness and elasticity compared to those noodles heated in an oil disclosed by Gotoh et al.

The examiner had committed reversible error, in failing to consider appellants' objective evidence of nonobviousness.

Rebuttal evidence and arguments can be presented by way of an affidavit or declaration under 37 CFR 1.132, e.g., *Soni*, 54 F.3d at 750, 34 USPQ2d at 1687; *In re Piasecki*, 745 F.2d 1468, 1474, 223 USPQ 785, 789-90 (Fed. Cir. 1984).

Appellants have provided rebuttal evidence that the claimed invention yields a fried instant noodle with unexpectedly improved texture upon reconstitution.

Rebuttal evidence may also include evidence that the claimed invention yields unexpectedly improved properties or properties not present in the prior art. Rebuttal evidence may consist of a showing that the claimed compound possesses unexpected properties. *Dillon*, 919 F.2d at 692-93, 16 USPQ2d at 1901.

In response to appellants' argument that the Gotoh et al. could not suggest an improvement in the texture of instant fried noodles, absent a disclosure of the preparation of the same, the examiner, at the bottom of page 5 of the examiners' answer, simply finds the argument not persuasive as the rejection is based on the combined teaching with the reference of Greene et al. Rather than explain how the combination of reference would provide some expectation of obtaining an improved texture by using the oil/fat of Gotoh et al. to prepare instant fried noodles the examiner, consuming the entirety of page 6 of the examiner's answer, only explains how there is motivation to combine the teachings of Greene et al. and Gotoh et al. and that when the oil of Gotoh et al. is used in a noodle making process as described by Greene et al. "it is obvious the improved texture is obtained because the same type of oil is used in the same type of product" (page 7, lines 1-3 of examiner's answer)

Such analysis fails to render any clearer, how the cited prior art provides any expectation that one would obtain an improve texture and elasticity in an instant fried noodle by using an oil/fat as claimed in preparing instant fried noodles. Quit to the contrary there is no suggestion of any such expectation. Appellants maintain that the discovered results of improved texture and elasticity are result which are not suggested in the prior art and therefore appellants' results are unexpected. For a result to be expected there must be some basis for such expectation. Conversely, without any such expectation, the results would be unexpected.

On page 7 of the examiners' answer, the examiner continues to criticize the test data presented in the Jun Kohor declaration in terms of the specific details of evaluation and the objectivity of the measurement, possible variations in detecting the flavor of flour, and how the differences in smoothness, elasticity and sogginess were measured. The testing parameters are provided in pages 4 and 5 of the Jun Kohori declaration. The declaration also states, on page 6, that the results demonstrate a superior smoothness and elasticity for samples (1) and (2) as compared with samples (3) and (4). Thus the probative value of the data from the declaration is clear.

As to groups II and III, appellants' demonstration of the highest rating for smoothness and elasticity (very smooth noodle surface and very elastic v. a rather smooth surface noodle and small elastic, noodle snaps) for an oil/fat composition containing 85.7 % of diglycerides (sample (1) in the Kohori declaration) is more supportive of claims directed to methods using 65 wt. % and 70 wt. % of diglyceride. The examiner's argument that such evidence is not of unexpected results in view of the disclosure in Gotoh et al. of using from 40-90 and 40-80 wt. % of diglyceride is erroneous as the disclosure of Gotoh et al. of an oil composition as claimed, fails to provide any expectation of improved texture and elasticity of an instant fried noodle.

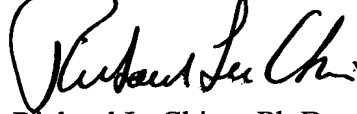
The examiner has erroneously dismissed appellants' demonstration of an unexpected improvement in reconstituted noodle texture and therefore the decision of the primary examiner must be reversed.

Appellants submit that the decision of the primary examiner is in error and therefore must be REVERSED.

Respectfully submitted,

OBLON, SPIVAK, McCLELLAND,  
MAIER & NEUSTADT, P.C.

Norman F. Oblon

A handwritten signature in black ink, appearing to read "Richard L. Chinn".

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